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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CELSO ANTONIO DAVILA-DIAZ,

Petitioner,

v.

ERIC H. HOLDER Jr., Attorney General,

Respondent.

No. 07-72000

Agency No. A071-586-657

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted July 29, 2009**

Before: WALLACE, LEAVY, and HAWKINS, Circuit Judges.

Celso Antonio Davila-Diaz, a native and citizen of Guatemala, petitions for review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal from an immigration judge's ("IJ") decision denying his application for asylum,

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

withholding of removal, and protection under the Convention Against Torture (“CAT”). We have jurisdiction under 8 U.S.C. § 1252. We review findings of fact for substantial evidence, *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 n.4 (9th Cir. 2003), and we review due process claims de novo, *Ram v. INS*, 243 F.3d 510, 516 (9th Cir. 2001). We deny in part and dismiss in part the petition for review.

In his opening brief, Davila-Diaz fails to address and therefore has waived any challenge to the BIA’s one-year bar finding. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259-60 (9th Cir. 1996).

Substantial evidence supports the agency’s conclusion that the anonymous threats Davila-Diaz received did not amount to persecution. *See Hoxha*, 319 F.3d at 1182. Further, substantial evidence supports the agency’s conclusion that Davila-Diaz failed to establish a clear probability of persecution because his similarly situated family members remain unharmed in Guatemala, *see Hakeem v. INS*, 273 F.3d 812, 816-17 (9th Cir. 2001), and because he failed to show he could not safely relocate within Guatemala, or that it would be unreasonable for him to do so, *see Knezevic v. Ashcroft*, 367 F.3d 1206, 1214-15 (9th Cir. 2004); 8 C.F.R. § 1208.13(b)(2)(ii). Finally, the record does not compel the conclusion Davila-Diaz’s withholding claim is based on a protected ground. *INS v. Elias-Zacarias*,

502 U.S. 478, 483-84 (1992). Accordingly, Davila-Diaz's withholding of removal claim fails.

Substantial evidence also supports the agency's conclusion that Davila-Diaz is ineligible for CAT relief. *See Singh v. Gonzales*, 439 F.3d 1100, 1113 (9th Cir. 2006).

Davila-Diaz's due process claim that the IJ erred by not considering a State Department report fails because Davila-Diaz did not submit the report to the IJ for consideration. *See Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (petitioner must show error and substantial prejudice to prevail on a due process challenge). We do not consider Davila-Diaz's due process argument that the IJ erred in not forwarding his asylum application to the State Department because he failed to exhaust this argument before the agency. *See Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004).

PETITION FOR REVIEW DENIED in part; DISMISSED in part.